

1991

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Recommended Citation

Sol Wachtler, *Judging the Ninth Amendment*, 59 Fordham L. Rev. 597 (1991).

Available at: <https://ir.lawnet.fordham.edu/flr/vol59/iss4/4>

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JUDGING THE NINTH AMENDMENT

by
SOL WACHTLER *

INTRODUCTION

THE ninth amendment to the United States Constitution reads: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People."¹ Virtually ignored for the first two centuries of its existence, the ninth amendment was catapulted into prominence in 1965 when Justice Arthur Goldberg, concurring in the judgment of the Supreme Court in *Griswold v. Connecticut*,² stated his belief that the right to marital privacy was a fundamental and basic right retained by the People within the meaning of the ninth amendment.³ Scholarly debate over the meaning and purpose of the ninth amendment has intensified over the past several years⁴ with the rise in prominence of the jurisprudence of original understanding during the Reagan administration and the widespread publicity that followed Judge Robert Bork's nomination to the Supreme Court and rejection by the Senate in 1987. In the midst of a highly theoretical debate, however, the significance of the ninth amendment has become elusive. At its most basic level, the conflict between conservative forces that have come to be personified by Judge Bork and more traditionally liberal legal scholars reflects mistrust of the role of the judiciary in shaping and giving content to fundamental constitutional rights. The ninth amendment debate is only the newest twist in an ongoing dialogue concerning the proper role of the judiciary, and the extent to which judges should infuse legal decisions with their own senses of right and wrong.

The very existence of the ninth amendment ensures that such a debate will continue. The act of assigning meaning to the open-ended language of this amendment requires judges to make political decisions about the provision's scope and effect. The simplicity of the ninth amendment itself presents an obstacle to its application to constitutional disputes. To give effect to the provision's obvious meaning is to sanction what many perceive to be untrammelled judicial activism. Yet to deprive it of any meaningful role in the protection of fundamental rights appears to violate the founders' intent. Thus, fixing the meaning of the ninth amendment and assigning the amendment a place in future constitutional jurisprudence requires judges to confront deeply held misgivings about the inde-

* Chief Judge of the State of New York.

1. U.S. Const. amend. IX.

2. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

3. *See id.* at 486-87.

4. For examples of recent scholarship, see *Symposium on Interpreting the Ninth Amendment*, 64 Chi.-Kent L. Rev. 37 (1988).

terminacy and the essentially undemocratic nature of the judicial process.

Further, any decision to give content to the ninth amendment would signal a break with more traditional, albeit often controversial, approaches to ensuring the protection of unenumerated rights. In a political climate where the employment of substantive due process doctrine to derive fundamental constitutional rights is attacked as illegitimate *Lochnerizing*, it is probable that any attempt to use the ninth amendment to derive such rights would give rise to the same attack. The ninth amendment is largely aspirational and gives no meaningful guidance to those who would use it to ensure the protection of unenumerated fundamental rights. Giving it substance by considering it a source of protection for such rights would break new ground and validate the sort of judicial lawmaking that proponents of original understanding most abhor.

This Article will consider the history of the ninth amendment and will look at recent scholarship to identify the concerns that continue to motivate those on both sides of the debate over the nature of the judicial process. Part I will look briefly at what prompted James Madison, the principal architect of the Bill of Rights, to create the ninth amendment. Part II will consider the amendment's present role in the struggle between conservative and liberal legal scholars for ascendancy in law school classrooms and the courts. Part II will also consider the implications of the debate over the meaning of the ninth amendment as it relates to an understanding of the judicial process. Part III will conclude that the ninth amendment is likely to remain dormant because to unleash the untapped power of the amendment would require judges to employ their own conceptions of fundamental rights. Such an openly subjective jurisprudence would be anathema to conservative judges and superfluous for liberal judges, who are accustomed to using a "penumbral" approach to identify and protect rights that do not fall squarely within the language of the more specific provisions of the Constitution.

I. THE HISTORY OF THE ADOPTION OF THE NINTH AMENDMENT

When the United States Constitution was first drafted, it did not contain a Bill of Rights.⁵ On September 12, 1787, Elbridge Gerry of Massachusetts, seconded by George Mason of Virginia, moved for the creation of a committee to prepare a bill of rights. This motion was, however,

5. For examinations of the history of the adoption of the ninth amendment, see Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 221 (1983); Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627 (1956); Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 Marq. L. Rev. 121 (1968); Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 New Eng. L. Rev. 215 (1972); Ringold, *The History of the Enactment of the Ninth Amendment and its Recent Development*, 8 Tulsa L.J. 1 (1972); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966).

unanimously rejected.⁶

The framers' failure to include a bill of rights was likely attributable at least in part to their common political philosophy.⁷ Educated in the English common law and the writings of John Locke and other political theorists, many of the founders believed that the people were the source of all legitimate political authority and possessed fundamental personal liberties that had their origin in the laws of nature. To eighteenth century thinkers, the liberty of man was as much a function and reflection of natural law as were the laws of physics.⁸ Despite the skepticism of some scholars,⁹ it is beyond serious dispute that natural law principles colored the outlook of those who drafted the Declaration of Independence and later the Constitution.¹⁰

In his Commentaries, Blackstone set forth the underpinnings of the political philosophy that so influenced the framers:

the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals . . . which in themselves are few and simple.¹¹

According to Blackstone, before man entered into society, he possessed "natural liberty," which was "a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation."¹² Man ceded a certain portion of this natural liberty when he chose to enter into society. The sovereign was, however, only permitted to restrain the natural liberties of man to the extent that such restraint was "'necessary and expedient for the general advantage of the publick.'" ¹³ Thus, despite the fact that man was required to surrender a portion of his natural liberty in return for the advantages of society, man retained certain fundamental rights that were not subject to government infringement. Blackstone identified these as the rights of personal security,

6. See J. Madison, *Journal of the Federal Convention* 717 (E. Scott ed. 1970).

7. See generally Erler, *Natural Right in the American Founding*, in *The American Founding: Essays on the Formation of the Constitution* 195, 196-97 (J. Barlow, L. Levy & K. Masugi eds. 1988) (discussing idea that people are the source of governmental power).

8. H. Commager, *Jefferson, Nationalism and the Enlightenment* 4, 82-84 (1975); Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1132 (1987).

9. See, e.g., J. Ely, *Democracy and Distrust* 39, 48-49 (1980) (arguing that Constitution, unlike Declaration of Independence, did not rely upon natural law principles).

10. See 5 *The Founders' Constitution* 395-99 (P. Kurland & R. Lerner eds. 1987).

11. 5 *The Founders' Constitution*, *supra* note 10, at 388 (quoting 1 William Blackstone, *Commentaries* 120-41 (1765)).

12. *Id.*

13. *Id.*

personal liberty and personal property.¹⁴

In light of their political philosophy, many of the framers believed that the national government created by the Constitution would be a government of specific enumerated powers, without additional implied powers to limit or otherwise infringe upon basic and fundamental personal rights.¹⁵ Moreover, the national government that they envisioned was to be superimposed upon a system that, through the operation of thirteen separate state governments and constitutions, already protected individual rights.¹⁶ As a result, there was no reason for the framers to expect that the establishment of a strong federal government would necessarily affect the balance between governmental power and personal freedom.¹⁷

The failure to include a bill of rights, however, became a serious obstacle to ratification of the new Constitution. George Mason, a critic of the Constitution as it emerged from the Convention, argued that "[t]here is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security."¹⁸ By January 1788, Connecticut, Delaware, Georgia, New Jersey and Pennsylvania had ratified the Constitution;¹⁹ but thereafter, seven of the remaining eight states attached proposed amendments to their acts of ratification. Delegates to the state ratifying conventions feared the consolidation of power in a single federal government and believed that this government would gradually assume more and more power, either by exercising the powers granted by the Constitution expansively or by the assumption of state and local authority.²⁰ The anti-federalists seized upon the omission of a bill of rights as a reason to oppose the ratification of the Constitution. Moreover, some supporters of the new Constitution urged the inclusion of a bill of rights out of concern that the charter would empower the federal government to infringe upon the natural rights and liberties of the people.²¹

The arguments concerning the inclusion of a bill of rights that took place in the Pennsylvania ratifying convention dramatically illustrate the positions of those on both sides of the debate. On November 28, 1787, delegate John Smilie expressed the fear that the fundamental rights of the

14. See *id.* at 390-94.

15. See Moore, *supra* note 5, at 247; Note, *supra* note 5, at 816.

16. Note, *supra* note 5, at 816.

17. *Id.*

18. Mason, *Objections to the Constitution of Government Formed by the Convention* (1787), in 2 *The Complete Anti-Federalist* 11 (H. Storing ed. 1981). Mason also noted that "[t]here is no Declaration of any kind for preserving the Liberty of the Press, the Tryal by Jury in civil Causes; nor against the Danger of standing Armys in time of Peace." *Id.* at 13.

19. See 1 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 319-24 (J. Elliot ed. 1836).

20. See Call, *Federalism and the Ninth Amendment*, 64 Dick. L. Rev. 121, 125 (1960).

21. See Ringold, *supra* note 5, at 3-4.

people were not secure under the new Constitution.²² Concerned that there was no protection for "rights of conscience," Smilie stated that "[s]o loosely, so inaccurately are the powers which are enumerated in this Constitution defined, that it will be impossible . . . to ascertain the limits of authority and to declare when government has degenerated into oppression."²³ Another delegate, Robert Whitehill, noted that

it is the nature of power to seek its own augmentation, and thus the loss of liberty is the necessary consequence of a loose or extravagant delegation of authority. National freedom has been, and will be the sacrifice of ambition and power, and it is our duty to employ the present opportunity in stipulating such restrictions as are best calculated to protect us from oppression and slavery.²⁴

A group of delegates argued, however, that a bill of rights was an "unnecessary instrument."²⁵ Thomas McKean contended that because the "whole plan of government" envisioned by the Constitution was "nothing more than a bill of rights—a declaration of the people in what manner they choose to be governed," there was no need for a separate bill of rights to be attached to the Constitution.²⁶ James Wilson argued that in creating and approving the Constitution, "the citizens of the United States appear dispensing a part of their original power in what manner and what proportion they think fit. They never part with the whole; and they retain the right of recalling what they part with."²⁷

Moreover, Wilson argued that an enumeration of rights would be dangerous because it could be construed to disparage any fundamental rights that might be omitted:

in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a Constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. . . . of the two it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous,

22. See 2 *The Documentary History of the Ratification of the Constitution* 386 (M. Jensen ed. 1976).

23. *Id.* at 392.

24. *Id.* at 393.

25. *Id.* at 387.

26. *Id.*

27. *Id.* at 389.

nor important, as an omission in the enumeration of the rights of the people.²⁸

The federalists prevailed in the Pennsylvania convention, and arguments in support of the inclusion of a bill of rights were rejected. On December 12, 1787, Pennsylvania ratified the Constitution.²⁹ The two proponents of a bill of rights, Smilie and Whitehill, cast their votes against ratification.³⁰

Wilson and McKean's arguments mirrored Alexander Hamilton's contention in Federalist Paper Number 84 "that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favour of privilege, reservations of rights not surrendered to the prince."³¹ He continued:

[i]t is evident, therefore, that according to their primitive signification, [bills of rights] have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations.³²

Like Wilson, Hamilton argued that a bill of rights was not only unnecessary to secure fundamental rights, but also potentially dangerous. To the extent that a bill of rights purported to protect personal rights against powers not granted to the federal government by the Constitution, it "would afford a colourable pretext [for the federal government] to claim more [powers] than were granted. For why declare that things shall not be done which there is no power to do?"³³

New York's ratifying convention, in which Hamilton took part, approved the Constitution without condition, but, as part of its form of ratification, included a declaration of rights "in confidence that the amendments which shall have been proposed . . . will receive an early and mature consideration."³⁴ The New York form of ratification served as a precursor to the Bill of Rights and signaled the concerns that eventually gave rise to the ninth amendment. The document also demonstrates the natural law background of the New York delegates. According to the New York delegates:

all power is originally vested in, and consequently derived from, the people, and that government is instituted by them for their common interest, protection, and security . . . [T]he enjoyment of life, liberty,

28. *Id.* at 388.

29. See 1 J. Elliot, *supra* note 19, at 319-20.

30. See 2 The Documentary History of the Ratification of the Constitution 590-91 (M. Jensen, ed. 1976).

31. A. Hamilton, J. Madison & J. Jay, *The Federalist or, the New Constitution* 438-39 (M. Beloff ed. 1987).

32. *Id.* at 439.

33. *Id.*

34. 5 The Founders' Constitution, *supra* note 10, at 13 (quoting 1 J. Elliot, *supra* note 19, at 327-31).

and the pursuit of happiness, are essential rights, which every government ought to respect and preserve. . . .

[T]he powers of government may be reassumed by the people whenever it shall become necessary to their happiness . . . [E]very power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and . . . those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.³⁵

The delegates declared, among other things, that people have a right to practice their religion freely and peaceably, a right to keep and bear arms, a right not to be deprived of life, liberty or property without due process of law, a right to be free from excessive bail or fines and from cruel and unusual punishment, a right to be free from unreasonable searches and seizures of their persons, papers or property, a right to a speedy, public trial by jury in criminal matters, a right to confront witnesses and a right to the assistance of counsel to prepare a defense, a right to assemble peaceably and the right to a free press.³⁶

Although James Madison was troubled by the public outcry for a bill of rights, he became the chief architect of the Bill of Rights, sorting through the various amendments suggested by the states that had ratified the Constitution. He was not entirely opposed to a bill of rights in theory; as a strong proponent of the "necessary and proper" clause, he recognized that the exercise of implied governmental authority might infringe upon the rights of individuals.³⁷ He also rejected the idea that a federal bill of rights was unnecessary because the state constitutions adequately protected against any such infringement.³⁸

Like Hamilton, however, Madison believed that the people possessed certain fundamental personal rights that were not compromised by the establishment of a centralized national government. Apparently, Madison feared that the very process of enumeration could endanger those rights, not only because an enumeration would give rise to an implication that the government had authority to infringe those rights not enumerated, as Hamilton and Wilson had argued, but because of the implication that any right that was not enumerated was not fundamental. In Federalist Paper Number 37, Madison described the difficulties inherent in translating the ideals underlying the Constitution into simple,

35. *Id.* at 12 (quoting 1 Debates on the Adoption of the Federal Constitution 327-31 (J. Elliot ed. 1836)).

36. *See id.*

37. *See* Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. Rev 1, 9-10 (1968).

38. *See* Caplan, *supra* note 5, at 254.

workable terms.³⁹ Madison feared that any enumeration of the inalienable rights of man would be imperfect and incomplete and that rights not enumerated but no less fundamental would be threatened by the failure to memorialize them.

Out of this concern emerged the ninth amendment to the Constitution, which was designed to prevent the denial or disparagement of fundamental rights that, for one reason or another, were not enumerated in the first eight amendments to the Constitution. Madison acknowledged the arguments against preparation of a bill of rights when he spoke in favor of what eventually would become the ninth amendment.

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.⁴⁰

The wording of this clause was changed only slightly, and by the fall of 1789, both houses of Congress had approved in substance what later became the ninth amendment.⁴¹

II. GIVING CONTENT TO THE NINTH AMENDMENT—WHAT ARE THE "RIGHTS RETAINED BY THE PEOPLE"?

When Justice Goldberg used the ninth amendment as the basis for his concurrence in *Griswold*, he touched off an avalanche of legal scholarship concerning the significance and scope of the neglected ninth amendment.⁴² Several legal scholars had studied the ninth amendment in the

39. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. Hence it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be conceived, the definition of them may be rendered inaccurate, by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.

A. Hamilton, J. Madison & J. Jay, *supra* note 31, at 80.

40. 1 Annals of the Congress of the United States 456 (J. Gales ed. 1851).

41. *See id.* at 784, 796, 923.

42. *See, e.g.,* Beane, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wis. L. Rev. 979, 988-93 (examining Court's various approaches to finding constitutional rights and the significance of *Griswold*); Kutner, *supra* note 5, at 142 ("The Ninth Amendment not only provides a guide for judicial action but it is also an injunction upon the legislative and the executive at both the Federal and State levels to secure the rights of the individual by positive action."); Van Loan, *supra* note 37, at 47, 48 (arguing that the ninth amendment is "undoubtedly available" to protect some unenumerated rights, but that the standards for recognizing such rights must be given a "more concrete definition . . . than did any of the justices in the *Griswold* majority"); Note, *Ninth Amendment*

years before the Court decided *Griswold*,⁴³ and the Supreme Court had earlier considered and rejected arguments resting in part on the assertion of rights under the ninth amendment.⁴⁴ Justice Goldberg's use of the amendment to support a right of marital privacy was, however, revolutionary.

The concurrence is well known and it is not my intention to recite it verbatim here. Rather, I propose to examine it briefly, because Justice Goldberg's discussion of the amendment contains the seeds of the academic debate that is currently raging over the amendment. Joined by Chief Justice Earl Warren and Justice William Brennan, Justice Goldberg stated his thesis succinctly:

[m]y conclusion that the concept of liberty . . . embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court . . . and by the language and history of the Ninth Amendment [which] reveal that the Framers . . . believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.⁴⁵

No Supreme Court justice had ever looked to the ninth amendment as the source of an unenumerated constitutional right. Justice Goldberg considered the history of the adoption of the ninth amendment and concluded that it "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."⁴⁶ In Justice Goldberg's view,

[t]o hold that a right so basic and fundamental and so deep-rooted in

Vindication of Unenumerated Rights, 42 Temp. L.Q. 46, 56-59 (1968) (discussing school dress codes as a possible area for ninth amendment application).

43. See, e.g., B. Patterson, *The Forgotten Ninth Amendment* 19-26 (1955) (arguing that ninth amendment protects natural rights); Call, *supra* note 20, AT 121-31 (DISCUSSING ROLE OF NINTH AMENDMENT IN FEDERAL CONSTITUTIONAL SCHEME); Dunbar, *supra* note 5, at 637 (discussing ninth amendment's adoption and Madison's "general theme of the immunity of certain subjects from governmental interference"); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. Rev. 787, 802-10 (1962) (interpreting ninth and tenth amendments to protect unenumerated rights); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 Ind. L.J. 309, 309-23 (1936) (arguing that ninth amendment protects against unnecessary extensions of federal governmental powers).

44. See, e.g., *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 95-96 (1947) (dismissal of civil servant because of work as political party official not violative of ninth amendment); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 143-44 (competition from federal agency, the Tennessee Valley Authority, did not violate the ninth amendment); *Ashwander v. TVA*, 297 U.S. 288, 330-31 (1936) (ninth amendment does not affect rights expressly granted to the federal government). See generally *Ringold*, *supra* note 5, at 9-17 (discussing pre-*Griswold* interpretations of ninth amendment).

45. *Griswold v. Connecticut*, 381 U.S. 479, 486-488 (1965) (Goldberg, J., concurring).

46. *Id.* at 492.

our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment.⁴⁷

Justice Goldberg argued that the ninth amendment is not an independent source of fundamental, unenumerated constitutional rights. He instructed judges to survey the "'traditions and [collective] conscience of our people'"⁴⁸ in order to determine whether a given principle is so deeply held to be deemed a fundamental right for the purposes of ninth amendment protection. "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions."⁴⁹ It is difficult to understand, however, how a judge could not be guided by his or her personal notions of right and wrong when considering what rights should be considered fundamental and deserving of full constitutional protection.

Thus, to some extent, Justice Goldberg did not see the ninth amendment as a source of rights but rather as a source of judicial power. Although it is unlikely that he would have articulated his view of the amendment in those terms, it is undoubtedly true that he envisioned that the judiciary would be charged with giving meaning and content to the ninth amendment. He left it up to judges to look beyond the specific guarantees of the Bill of Rights and canvass American culture in an effort to determine what rights are fundamental and deserving of protection. A judicial failure to engage in such an inquiry would disparage those rights not enumerated by the framers and thereby contravene their clear intent that those rights be protected under the ninth amendment.

Justice Goldberg's sense that it is appropriate for a judge to look beyond the specific guarantees of the Bill of Rights to secure the protection of unenumerated rights is at the heart of the current controversy over the proper scope of the ninth amendment. There are essentially two camps among those scholars who have studied the ninth amendment—those who see it as a source of protection for unenumerated fundamental rights, and those who see it as a rule of construction that adds nothing of substance to the rights that are protected by the Constitution.⁵⁰ It is safe to say that the members of the latter group have a more conservative view of the proper role of judges in the identification of fundamental rights. They are inclined to argue that judges should not stray beyond

47. *Id.* at 491.

48. *Id.* at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

49. *Id.*

50. See generally Soderberg, *The Ninth Amendment: A Great Debate*, 16 *Barrister Magazine* 47, 48 (Winter 1989-90) ("[T]he Ninth Amendment at most points to other parts of the Constitution.").

those rights specifically enumerated in the Bill of Rights. In his recent book *The Tempting of America*,⁵¹ Judge Robert Bork, not surprisingly, showed himself to be among these scholars.

Bork reasons that

it is inconceivable that men who viewed the judiciary as a relatively insignificant branch could have devised, without even discussing the matter, a system, known nowhere else on earth, under which judges were given uncontrolled power to override the decisions of the democratic branches by finding authority outside the written Constitution.⁵²

He concludes that the rights retained by the People are those that had been guaranteed by the various state constitutions, statutes and common law before the Constitution and Bill of Rights were adopted.⁵³

It is clear that the framers, as adherents to the natural law tradition, believed that the People possessed certain fundamental personal rights apart from those granted by the Constitution. We cannot necessarily infer, however, that the framers foresaw the extent to which the judiciary would gradually assume authority over the protection of fundamental personal rights, or that if they did foresee it, they would necessarily condemn it. Because the framers believed that no branch of government would have the power to threaten or restrict fundamental rights retained by the People, the current controversy about the legitimacy of judicial lawmaking and its supposed counter-majoritarian tendencies does not necessarily serve as a guide to what the framers intended the ninth amendment to mean. In fact, evidence that James Madison considered the legislature to be the most dangerous branch of the government and saw the political power of the majority as the greatest potential threat to the rights of the People⁵⁴ makes it extremely unlikely that he ever intended that the legislature have exclusive power to protect fundamental rights.⁵⁵ For that reason, today's debate cannot be resolved solely through reference to the views of the framers. They shared a political philosophy and a historical perspective that to us seems both dated and limited.

The debate among modern scholars is a reaction to the enormity of the power that the judiciary has amassed over the past two hundred years. It

51. R. Bork, *The Tempting of America* (1990).

52. *Id.* at 185.

53. *Id.* at 184-85.

The meaning of the ninth amendment is therefore entwined with the meaning of the Bill of Rights as a whole, for the amendment's purpose is to preserve individual rights that had long been protected by the states If natural law is embedded in the ninth amendment, it is because at the time the ninth was adopted natural law was an integral part of justiciable state law. Both Hamilton and Madison are clear that unenumerated rights refer to the laws of the several states, not to anterior, transcendent federal norms.

Caplan, *supra* note 5, at 260-61.

54. See Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1, 17 (1988).

55. See *id.* at 17-19.

also reflects the increasingly prominent role in the articulation and protection of personal rights, some that are specifically enumerated, others that are implied by generous readings of the first eight amendments and the fourteenth amendment.⁵⁶ Thus, Judge Bork's view of the ninth amendment is informed by his legal and political views regarding the need for judges to exercise restraint.

Judge Bork does not consider the political philosophy of the framers to be dispositive in construing the amendment. If he did, he would be compelled to give effect to the framers' belief in fundamental rights that exist apart from positive law. Instead, in confronting the admittedly open-ended language of the ninth amendment, Bork projects his own opinions regarding the role of the judiciary onto the provision. While this is not wrong or intellectually dishonest, it greatly diminishes the historical validity of his argument. If all that Judge Bork is able to state with certainty is that the ninth amendment should be accorded a particular meaning because he, as a judicial conservative, cannot conceive it to have another meaning, his view is nothing more than personal opinion. In no way does it have the imprimatur of quasi-divine truth, which seems to be what conservative legal thinkers seek in the theory of original understanding. Indeed, by proposing that the ninth amendment be given no role as a source of fundamental rights, Bork is making the same sort of personal, policy-based decision that he would no doubt criticize Justice Goldberg for making. It is personal philosophy, and not history or the language of the Constitution itself, that becomes the motivating force behind this sort of debate.

But arguments of this type become troublesome when we consider their implications for judges still on the bench considering constitutional arguments based in whole or in part upon rights asserted under the ninth amendment. If the ninth amendment indeed has some meaning and purpose, something that its very existence would seem to indicate, its terms would seem to control. For judges to ignore it would be an apparent violation of the framers' express intent.⁵⁷

56. Raoul Berger acknowledged as much when he wrote

[t]he ninth amendment demonstrably was not custom-made to enlarge federal enforcement of 'fundamental rights' in spite of state law; it was merely declaratory of a basic presupposition: all powers not 'positively' granted are reserved to the people It is against this background that the Goldbergian resort to the ninth amendment is to be viewed; another bit of legal legerdemain whose purpose is to take from the people their right to self-government and put it in the hands of the Justices.

Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 23-26 (1980).

57. For a constitutional interpreter to say, as . . . Judge Bork ha[s] done, that the set of enforceable constitutional rights is limited to those specified in the text is . . . precisely to defy the ninth amendment by denying that there are other rights retained by the people and by disparaging the enterprise of searching for a mode of analysis that might flesh out this admittedly otherwise skeletal remainder.

Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 Chi.-Kent L. Rev. 131, 142 (1988).

The very existence of the ninth amendment serves as proof that the school of original understanding fatally misreads the purpose and role of the Bill of Rights:

[t]he Framers were aware of the elasticity of the common law and the changing nature of state constitutions and statutes. This broad formulation of the ninth amendment was generally preferred to the suggested approach of anti-federalists such as Patrick Henry and George Mason who advocated incorporating the common law directly into the Constitution. It was feared that incorporating the common law would freeze it at the date of ratification of the Constitution, prohibiting its future development and growth. The Framers recognized that the law is not static and knew that they would not foresee every contingency that might threaten individual rights and thus require constitutional protection.⁵⁸

The continued vitality of the Constitution and the Bill of Rights is indeed a tribute to the delegates of the state conventions who contributed the language that came to enshrine the principles that the first Americans held most dear. But that vitality is threatened by an interpretive approach that would render a nullity the framers' intent to protect unenumerated fundamental rights as fully and completely as those that were enumerated in the first eight amendments. The framers were not so arrogant as to presume that they were able to articulate for all time the entire range of rights that were fundamental and guaranteed by the laws of nature. It is for that reason that the ninth amendment, however enigmatic, took form. The provision became a statement of the framers' profound belief that fundamental rights were fundamental because they were a function of the natural order and not because they were memorialized in the Constitution and elevated by popular consent into the law of the land. James Madison's fear of memorializing rights was related in part to his concerns about the limitations of language that would surface in the course of any attempt to define and articulate the broad panoply of rights that the American people retained after giving their consent to the government created by the Constitution.⁵⁹ Scholars who ignore this aspect of constitutional history favor reining in activist judges, limiting them to reliance upon what is written and can be determined empirically.

To treat the ninth amendment as an historical anomaly that adds nothing to serious constitutional jurisprudence, simply because the amendment is difficult to understand, not only violates the mandate that unenumerated rights be neither denied nor disparaged, but also ignores the framers' intent that the Constitution be read broadly to protect fundamental rights. While we no longer share the framers' natural law philosophy, we should not overlook the definite and profound ways in which

58. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention,"* 74 Geo. L.J. 1719, 1728 (1986) (citations omitted).

59. See Wachtler, *Our Constitutions—Alive and Well*, 61 St. John's L. Rev. 381, 390-91 (1987).

that philosophy shaped both the enumeration of certain rights in the Constitution and the adoption of a provision expressly designed to protect fundamental unenumerated rights.

Scholars who generally support an active role for the judiciary in the identification and articulation of unenumerated fundamental rights have given the ninth amendment its literal meaning in light of the framers' natural law tradition: that there are fundamental rights that exist outside of the Constitution and that the framers believed were as deserving of protection as those rights enumerated in the Constitution.⁶⁰ Many of these legal scholars attempt to make the legal universe created by this view of the ninth amendment slightly less open-ended by identifying objective sources to give content to the amendment.⁶¹

One approach has been to turn the original understanding philosophy on its end by looking to historical evidence that the framers intended that extratextual sources of authority be employed to aid in the interpretation of the Constitution.⁶² Professor Thomas Grey, a leading advocate of this school, "treat[s] the text as the overriding source where it speaks clearly, but [as] supplemented by an unwritten constitution made up of principles that underlie precedent and practice as seen from the perspective of the present."⁶³ Indeed, he notes, the ninth amendment and the due process clauses themselves authorize judges to look beyond the written language of the Constitution.⁶⁴

Advocates of this approach base their views on a reading of the natural rights tradition that informed the debates in the state ratifying conventions about the need for a bill of rights. These constitutional scholars look to the British concept of an unwritten constitution to support their theory that the framers intended extratextual sources to be used to derive fundamental rights deserving of constitutional stature and protection.⁶⁵ According to these scholars, the American colonists believed that the

60. With a comprehensive perspective, the courts could more easily and more rationally discover the content of rights which are not specifically enumerated in the Constitution but which are, nevertheless, rooted in the expectations of the people and in documented policy. A court which uses these sorts of indicia of 'rights' content would not be acting arbitrarily, deferring to transcendental sources, or expounding a personal social preference. On the contrary, it would be rationally implementing social demands and expectations which are generally shared and which are empirically discernible.

Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 Cornell L. Rev. 231, 236-37 (1975).

61. See *id.* at 260-66.

62. See, e.g., Grey, *The Uses of an Unwritten Constitution*, 64 Chi.-Kent L. Rev. 211, 221 (1988) ("The text itself authorizes resort to these unwritten sources through provisions like the ninth amendment and the due process clauses."); Sherry, *supra* note 8, at 1156 ("The architects of our constitutional system assumed that appeals to natural law would continue despite the existence of a written constitution.").

63. Grey, *supra* note 62, at 221.

64. See *id.*

65. See *id.* at 217; see also Sherry, *supra* note 8, at 1129 (British ideas were "tremendously influential upon the generation that framed the American Constitution").

unwritten British constitution consisted of "a mixture of custom, natural law, religious law, enacted law, and reason" and could be invoked by judges to invalidate Acts of Parliament.⁶⁶ The belief of early American judges in the concept of an unwritten constitution is evident from their treatment of arguments based in whole or in part on the assertion of unenumerated rights. Professor Sherry has examined a number of state cases that were decided before 1787 in detail and concluded that

[t]hese cases suggest that for American judges in the late eighteenth century, the sources of fundamental law were as open-ended as they were in English opposition theory. The colonists inherited a tradition that provided not only a justification for judicial review but also guidelines for its exercise. *As Bolingbroke proposed in theory and the new American states translated into action, judges were to look to natural law and the inherent rights of man, as well as to the written constitution, in determining the validity of a statute.*⁶⁷

Professor Sherry notes that a belief in natural law also rested at the foundation of several early decisions of the Supreme Court, most notably cases in which the justices were called upon to consider the rights of individuals.⁶⁸ This philosophy, however, became increasingly subject to criticism as the eighteenth century reliance on natural law principles declined and was gradually replaced by a view of the Constitution as the only legitimate source of fundamental law.⁶⁹ Professor Grey has pointed out, however, that while nineteenth century constitutional doctrine decreased its reliance upon natural law principles, nineteenth century judges did not increasingly ground decisions in the express language of the Constitution. On the contrary, the meaning and scope of general clauses of the Constitution were expanded to encompass rights that would once have been treated as natural and fundamental, though unenumerated.⁷⁰

This group of scholars has contributed a fascinating historical perspective to the debate over the meaning of the ninth amendment. They validate what might at first glance appear to be an untenable position—that the ninth amendment exists solely as a means for the protection of rights that are to be derived and defined solely through extratextual sources. Once we accept, however, that the founders intended future generations to protect rights, there still remains the problem of identifying those rights. This is an entirely different area of ninth amendment scholarship. A number of commentators have attempted to list what they consider to be fundamental rights that fall outside the scope of the first eight amendments to the Constitution. Professor Bertelsman, for example, places family rights, privacy rights, personal fulfillment rights and economic

66. Sherry, *supra* note 8, at 1129.

67. *Id.* at 1145 (emphasis added).

68. *See id.* at 1168-70; Grey, *supra* note 62, at 221.

69. *See* Sherry, *supra* note 8, at 1170; Grey, *supra* note 62, at 221.

70. *See* Grey, *supra* note 62, at 218.

and property rights on a tentative list of those unenumerated rights that could be protected by the ninth amendment.⁷¹ In his discussion of the ninth amendment, O. John Rogge takes an extended look at a number of unenumerated rights that have been protected by the other eight amendments of the Bill of Rights, among these the right to privacy, the right to engage in political activity, the right to move freely, the right to obtain knowledge, the right to confrontation in proceedings other than criminal proceedings, the right to use the mails and the right to picket peacefully.⁷² Finally, Professor Paust cites to the "value matrix" proposed by Professors McDougal and Lasswell, and lists the following as discoverable and fundamental human values that deserve protection under the ninth amendment: (1) the right to participation in the governmental process; (2) the right to "sanctity of person" and the opportunity for personal fulfillment; (3) the right to intellectual enlightenment and the "freedom of inquiry and opinion"; (4) the right to human dignity and freedom from discrimination; (5) the right to access to goods and services; (6) the right to acquire the skills needed to achieve self-fulfillment; (7) the right to worship and to follow and communicate personal and community values and morals; (8) the right to choose and form personal relationships freely; (9) in sum, the right to personal security and autonomy.⁷³

Identification of unenumerated rights is an interesting theoretical exercise, but does not take into account the jurisprudential obstacles that stand in the way of employing the ninth amendment to protect unenumerated fundamental rights. In order to counter the argument that use of the ninth amendment will add to judges' already considerable power, some commentators seek an objective source from which unenumerated rights can be derived. For example, a number of scholars⁷⁴ look to the Universal Declaration of Human Rights,⁷⁵ which was adopted by the General Assembly of the United Nations in 1948. Although not officially treaty law, the Declaration is nonetheless a statement of those human rights that society considers both fundamental and absolute. More importantly for judicial conservatives who fear that judges will use their own conceptions of right and wrong to formulate fundamental rights out of whole cloth, the Declaration is an accepted source that could serve as an objective basis for the definition and derivation of fundamental rights protected by the ninth amendment. The Declaration thus serves the purpose of giving content to the ninth amendment without necessarily sanctioning a gradual expansion of judicial authority in the articulation of fundamental rights.

71. See Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. Cin. L. Rev. 777, 790-93 (1968).

72. See Rogge, *Unenumerated Rights*, 47 Calif. L. Rev. 787, 799-826 (1959).

73. See Paust, *supra* note 60, at 263 (citing M. McDougal, *Studies in World Public Order* 336-37 (1960)).

74. See Bertlesman, *supra* note 71, at 789; Paust, *supra* note 60, at 259.

75. G.A. Res. 217 (III) A, 3 U.N. GAOR Res. at 71, U.N. Doc. A/810 (1948).

To some extent, then, the objections of judicial conservatives are addressed so long as there exists an objective source from which fundamental rights originate and against which constitutional arguments asserting these rights can be measured. Yet the question remains whether the articulation of so-called "fundamental" rights is either a proper or acceptable judicial function, or whether efforts in this area would be viewed as judicial lawmaking in its most raw and undemocratic form. I now turn to a discussion of why ninth amendment study is tied so completely to a search for external sources that can serve as objective bases for the derivation of unenumerated rights and whether this search is either feasible or desirable as a jurisprudential matter.

III. SHOULD JUDGES BE INVOLVED IN THE BUSINESS OF ENUMERATING FUNDAMENTAL RIGHTS?

John Hart Ely, in his book *Democracy and Distrust*,⁷⁶ examines the open-ended provisions of the Constitution, including the ninth amendment, and asks whether "a principled approach to judicial enforcement of the Constitution's open-ended provisions [can] be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy."⁷⁷ He then considers a variety of sources from which fundamental rights could be derived—the judge's own values, natural law, neutral principles, reason, tradition, consensus and predictions of future progress. In rejecting these efforts as futile, he concludes that only by encouraging popular participation in the processes of government can judicial review in this area attain any measure of legitimacy.⁷⁸

It is not my purpose here to critique either Professor Ely's conclusions or his methodology. In fact, it is because I agree with his succinct statement of the interpretive problems posed by open-ended clauses in the Constitution that I begin my discussion here by citing to his book. After all the history is reviewed and political philosophy digested, the question remains whether we want our judges to attach constitutional significance and accord constitutional protection to rights that individual judges have determined are fundamental. Moreover, if the answer to that question is yes, another question demands to be answered—how can we ensure that the judges are identifying rights that are truly fundamental and not simply exercising judicial power in such a way as to bring about their own personal conception of the common good?

Last June, following the Supreme Court's decisions in *United States v. Eichman* and *United States v. Haggerty*,⁷⁹ lawmakers debated whether a constitutional amendment permitting the prosecution of individuals who desecrated or destroyed the American flag should be added to the Consti-

76. J. Ely, *supra* note 9.

77. Ely, *supra* note 9, at 41.

78. *See id.* at 44-70, 73-104.

79. 110 S. Ct. 2404 (1990).

tution. President Bush and a number of other lawmakers, including Senator Robert Dole of Kansas, spoke out in favor of the proposed amendment.⁸⁰ However, the issue threatened to become a political liability for lawmakers who, while opposed to flag burning, questioned whether the Constitution should be amended to restrict what the Court had determined was protected speech under the first amendment. Ten days after the decision was announced, the proposed amendment died on the floor of the House of Representatives in a vote of 254 for and 177 against,⁸¹ 34 votes short of the two-thirds needed to send it on to the Senate.

The flag burning issue remains an interesting illustration of the considerations that are implicated when there is movement toward delineating a value that is held in common by a large number of Americans and according it constitutional protection. Amending the Constitution to protect the flag would have achieved through political means an end that the Court could arguably have brought about by invoking the ninth amendment and upholding the flag burning statute as a protection of a deeply held American value. Thus, the political aftermath of the *Eichman* decision is instructive in resolving the question of whether concern for fundamental values should animate judicial determination of arguments based upon the assertion of constitutional rights, or whether such values are better evaluated and balanced through the political process.

It is not to engage in partisan politics to observe that support for the flag burning amendment was an emotionally charged political issue that became a litmus test for patriotism among members of Congress. Those who withheld their support faced the possibility of being branded by opponents as unsupportive of the flag and the values that it embodies. This political gamesmanship is to be expected, especially where a Republican in the White House and a Democratic majority in both houses of Congress are looking forward to a number of hotly contested congressional races in the fall. Yet the controversy demonstrates that what can arguably be labelled a fundamental value—respect for the flag—can also become a tool for politicians who, however sincerely they may believe that desecration of the flag is wrong, cannot overlook the implications that support for that fundamental value may have on the political process.

Thus, articulation and elevation of a fundamental right to constitutional status is not a politically neutral act. A fundamental value such as respect for the flag does not exist in isolation, waiting to be discovered and identified. Rather, the value, even if held by the majority or a powerful minority of Americans, means different things to different people. Moreover, different people are not willing to sacrifice the same things to see the value protected by the Constitution. Thus, the identification of a

80. Greenhouse, *Supreme Court Voids Flag Law; Stage Set for Amendment Battle*, N.Y. Times, June 12, 1990, at A1, col. 1.

81. 136 Cong. Rec. H4087-88 (daily ed. June 22, 1990).

fundamental value, even if it can legitimately be called fundamental, will always be controversial.

Suppose that in this case the Court had indeed found that respect for the flag was a fundamental value that was entitled to the full range of constitutional protection under the ninth amendment. The Court would have concluded that the flag burning statute was constitutional as a legitimate measure designed to further that value.⁸² Noting that a majority of Americans cherish the flag and all that it represents, the Court might have found that protection of the flag from desecration was a fundamental constitutional value. This result, however, would operate to limit constitutional protections of political speech. Such a constriction of first amendment protections would not be universally applauded, as evidenced by the debates that followed the *Eichman* decision and the movement for a flag burning amendment. What opponents of the amendment seemed to fear most was that veneration for the flag, itself unobjectionable, was threatening to curtail freedom of speech, a value clearly expressed in the Bill of Rights and one of the values that made the flag worth venerating. In short, treating respect for the flag as a fundamental value deserving of constitutional protection would have required a compromise of rights already enshrined in constitutional jurisprudence.

Thus, what the flag burning controversy reveals is that to decide whether to elevate one value can in certain instances require balancing that value against another held equally dear. However clear the ninth amendment language may be, fundamental values are not diamonds in a mine that need only to be extracted, cut and polished for their beauty and clarity to shine through. They do not exist in isolation; rather, they are part of a universe in which other rights have already been catalogued and accorded protection through an expansive reading of the first eight amendments, as well as the fourteenth. There is always the possibility that a right or a value cannot be fully protected without limiting another right that has already been recognized and accorded constitutional protection. The process of identifying new rights and weighing them against rights that are already accorded constitutional protection is fraught with political consequences, and I question whether judges should be involved in such an undertaking.

To some extent, then, I believe that Professor Ely has stated the question well. We live in a democratic society and the Constitution, as the blueprint for a representative democracy, has served us well for the past two hundred years. Yet it is beyond dispute that this blueprint for a democratic society contains a provision that has the potential to operate

82. I realize that legal arguments based upon the assertion of ninth amendment rights do not usually take this form. Rather, they are raised to challenge the enactment of a law that purportedly violates the fundamental, though unenumerated, rights of a segment of the population. The ninth amendment has been used so infrequently and its language is so general, however, that I can see no reason why it could not form the basis for a defensive argument of the type that I propose.

in a decidedly undemocratic way. It seems to me intellectually dishonest to read the ninth amendment as anything but an exhortation to future generations to look beyond the four corners of the document and seek out the full range of rights retained by the People and entitled to constitutional protection. But intellectual honesty takes me only so far. Once I have acknowledged that the framers intended the ninth amendment to mean what it says, I find myself in a quandary that I am unable to resolve. To ignore the amendment is to transgress its express language; to give it full effect is to threaten the democratic society envisioned by the framers.

While I believe that the judicial process is well suited to the protection of fundamental rights and liberties,⁸³ I also believe that given the nature of the judicial process and of the constitutional controversies that the Court considers, judicial lawmaking is certainly most defensible and desirable when its focus is upon fundamental rights that can be discerned from the words of the Constitution itself. The nature of the judiciary and the judicial process, as well as principles of justiciability, legitimate the process of judicial lawmaking by relating the decision-making process to a defined controversy between specific parties.⁸⁴ When constitutional rights are asserted, judicial lawmaking remains legitimate, principally because features unique to the judicial process and the judiciary as an institution ensure that the result reached is grounded in the text of the Constitution and takes into account the situation of the parties before the court.⁸⁵ When rights secured by specific constitutional provisions are construed within the context of a specific case, the judicial process is well adapted to the articulation and protection of those rights.

When rights are not referenced to specific constitutional guarantees and articulation of those rights entails choices that are essentially political in nature, I question whether the judiciary should become directly involved. This is not because I doubt the ability of judges to weigh competing interests, nor because I am foolish enough to believe that individual conceptions of right and wrong never motivate judges considering arguments based upon the assertion of constitutional rights. Rather, I believe that to give the ninth amendment its literal meaning is to sanction a process whereby the judiciary is empowered not only to determine what rights could conceivably be retained by the People, but also to weigh the protection of those unenumerated rights against rights that have already been accorded constitutional protection through an expansive reading of other amendments of the Constitution. This process, as I have noted earlier, will often be controversial. I believe that the unique features of the judiciary—its independence, its traditional mode of analysis and explication—do not necessarily legitimate a judicial role in the articulation and protection of rights that are not in any way grounded in

83. See Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. Rev. 1, 19 (1990).

84. See *id.* at 16-20.

85. See *id.* at 18-20.

the explicit language of other rights-bearing provisions of the Constitution. A decision whether to protect unenumerated rights at the expense of enumerated rights is often a function better left for the political process.

I have no doubt that the founders intended that the Constitution, a compact among the thirteen original states, achieve timelessness through its ability to weather social and political change with its core principles and ideals intact and indeed strengthened. Certainly, they had no idea of the range of technological and social changes that would follow the founding of the American republic. If they had been blessed with such prescience, I am not sure that they would have agreed on a reading of the Constitution that could reconcile their vision with the demands of future generations. I believe, however, that the ninth amendment, however clear its language, cannot be given an expansive reading that would essentially sanction judicial authority to resolve disputes that are probably better left for the political process.

Indeed, judicial protection of fundamental rights under the ninth amendment is likely superfluous in modern constitutional jurisprudence. The Supreme Court, through a generous reading of the first eight and the fourteenth amendments, has ensured the continued vitality of the Constitution and the continued protection of personal rights. The Supreme Court's use of a substantive due process analysis to protect rights that are not explicitly enumerated in the Constitution has been attacked by judicial conservatives.⁸⁶ The assertion and protection of rights in this manner has, however, become an accepted aspect of constitutional jurisprudence that will likely continue to lead to a broad protection of unenumerated rights—a process that the founders clearly intended to encourage when they drafted the ninth amendment. Although public perception is not dispositive in determining whether the judiciary is operating within the scope of its authority, any assertion of essentially limitless judicial authority to discover rights entirely through construction of extratextual sources would open the judiciary to widespread criticism. Given the intent of the framers and the language of the ninth amendment, this criticism might not be warranted. It would, however, surely follow any effort to revive the ninth amendment to protect personal rights.

In the final analysis, the ninth amendment best serves as a reminder that the framers did not intend that the Constitution be a static document and that rights asserted by the People against the government be limited by the express language of the first eight amendments.⁸⁷ The framers believed that the People had broad personal rights that no government could take away. The first eight amendments were not an exhaustive expression of those rights, and the ninth amendment was

86. See Bork, *supra* note 50, at 31.

87. See Arnold, *Doing More Than Remembering the Ninth Amendment*, 64 Chi.-Kent L. Rev. 265, 265-68 (1988).

adopted to ensure that a failure to enumerate fundamental rights would not prove fatal to other rights retained by the People. The Constitution also created a representative democracy, carefully crafted to avoid the concentration of power in any one branch of the government. Whatever the strengths and unique attributes of the judiciary, I do not believe that this institution should engage in decision-making that is essentially political in nature. Where rights are given content and protection through the use of a provision that exhorts without giving either guidance or direction, I believe that the line between legitimate and illegitimate judicial lawmaking is crossed.

CONCLUSION

The ninth amendment was adopted to ensure that unenumerated rights would be protected. While to use this amendment as a means of identifying and elevating certain "fundamental rights" to constitutional protection would be a mistake, I believe that the amendment nonetheless should be considered as a testament to the intent of the founders that the Constitution be read broadly to protect a wide range of personal rights.